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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GEORGE JENKINS, Plaintiff and Appellant, v. CITY OF CORONA et al., Defendants and Appellants.	E036270 (Super.Ct.No. RIC359371) OPINION

APPEAL from the Superior Court of Riverside County. Erik Michael Kaiser, Judge. Reversed.

Best, Best & Krieger, Jeffrey V. Dunn, Mark D. Servino, and Marc S. Ehrlich, for Defendant and Appellant City of Corona.

Law Office of Brent & Klein and Jason G. Brent, for Plaintiff and Appellant George C. Jenkins.

Defendants and Appellants City of Corona (City), the members of the City Council of the City, Karen E. Stein, Janice L. Rudman, Darrell Talbert, Jeff Miller,

Jeffrey P. Bennett, and Keith Clark, the building officer of the City (collectively, defendants) appeal from a judgment entered in favor of Plaintiff and Appellant George C. Jenkins (Jenkins), and from the trial court's denial of their motion to vacate the judgment. Jenkins cross-appeals from the same judgment, from various rulings made by the trial court during the trial, and from the court's denial of his motion for attorney fees under Code of Civil Procedure section 1021.5. For the reasons set forth below, we shall reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

On May 31, 2001, plaintiffs The Paladin Fair Housing Coalition, Inc., dba "The Paladin Group" (Paladin), Barratt American Incorporated (Barratt), and Jenkins (collectively, plaintiffs) filed a complaint for validation proceeding, declaratory relief, injunctive relief, and petition for writ of mandate against defendants.

Paladin provides "consulting services to individuals, businesses, corporations, industries and utilities which need representation and advice with respect to government regulations, fees and exactions." Barratt is "a merchant builder constructing a large number of residences in various counties throughout the State of California. In the past, Barratt constructed single family homes in Riverside County and may, depending upon economic circumstances, construct single family homes in the [City] in the future." Jenkins "is a citizen and resident of the [City]."

Plaintiffs and the City have been adversaries in previous legal proceedings. In 1997, Barratt sued the City for a refund of building permit and plan check fees. Barratt

alleged violations of the Mitigation Fee Act (Gov. Code,[1] § 66000 et seq.) (the Act). The City prevailed on statute of limitations grounds, and we affirmed the judgment. In 1999, Barratt, Paladin and Jenkins filed a lawsuit against the City alleging that one of the City's fee resolutions violated the Act by setting fees that exceeded the cost of providing services. Paladin and Barratt dismissed the action with prejudice when the City passed a new fee resolution.

Most recently, in this case, plaintiffs challenge building inspection and safety fees established by the City under Resolution No. 2001-44 (Resolution 01-44).

Background on Resolution 01-44

The City regularly adjusts and recalculates its building and safety plan check fees. As part of its ongoing effort to ensure compliance with the Act, the City has retained Revenue Cost Specialists (RCS) every two years since 1994, to perform a "cost of service fee study" and to generate a "cost allocation plan" to ensure that the City sets fees at levels corresponding to the estimated cost of providing future services.

Before adopting Resolution 01-44, the City commissioned RCS to perform a cost of service fee study to ensure compliance with the Act – which requires that local agency regulatory fees not exceed the reasonable estimated cost of providing services.

In March 2001, RCS performed a study for the City's building department. The study documented the revenues generated and costs incurred by all the City's fee-related services, and made fee recommendations based on RCS's analysis of that data.

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[1] All statutory references are to the Government Code unless otherwise specified.

RCS calculated proposed fee reductions for each building department service using a ratio of budgeted cost divided by average revenue. Based on this study, on May 16, 2001, the City passed Resolution 01-44 to *reduce* the building permit and plan check fees to eliminate the surplus, in accordance with RCS's recommendations.

Procedural Background

On May 31, 2001, plaintiffs filed a "complaint for validation proceeding (Government Code §66022, CCP §860); declaratory relief (CCP §1060); injunctive relief (CCP §526, 526a, Civil Code §3422); and petition for writ of mandate (CCP §1085); and request for attorney fees" against the City, the city council and the City's building official. Plaintiffs alleged that Resolution 01-44 imposed fees that violated the Act, various provisions of the Health and Safety Code, Proposition 13, Proposition 62, the Fifth and Fourteenth Amendments to the United States Constitution, and Title 42 United States Code section 1983. They sought a judicial declaration that the resolution was invalid, an injunction against enforcing the resolution, a writ of mandate ordering the City to cease collecting fees under the resolution, and an order compelling the City to apply past excess revenues to reduce future fees.

The City moved for summary judgment on the ground that plaintiffs lacked standing to sue because they were not "interested persons" under California's validation statutes, i.e., those with a direct interest in the litigation and not merely a consequential interest in its outcome. The court granted the motion as to Paladin and Barratt, but denied it as to Jenkins.

Thereafter, the City moved for summary judgment arguing in part that the Act applies only to new or increased fees, not to the City's reduction of fees accomplished by the resolution. The court denied the motion on the ground that sections 66015 and 66022 allow lawsuits challenging reductions in existing fees.

Subsequently, the case went to trial. In its Statement of Intended Decision, the trial court again found that "§§ 66016 and 66022 read in concert do not prevent challenges to fees that are reduced by a public [entity]." The court went on to find that the City's "method of determining the fee [did] not comply with Government Code §§ 66014 or 66016." In the judgment issued on April 8, 2004, the trial court adopted its statement of intended decision as a statement of decision and "directed that a Judgment and Preemptory Writ of Mandate should issue in the case[.]" The court ordered that the City (1) "cease and desist using the current methodology employed by the [City] to determine the fees and charges by the [City] to the public for the services of its building department as the methodology presently used violates the law[;]" and (2) enact "a new resolution or ordinance which establishes fees for the building department such that those fees do not exceed the estimated reasonable cost of providing the service and such that those fees are reduced . . . ."

On April 23, 2004, defendants filed a motion to vacate the judgment. On June 14, 2004, the trial court denied the motion to vacate.

Defendants appeal from the judgment and the trial court's denial of their motion to vacate the judgment. Jenkins cross-appeals from the same judgment, from various

rulings made by the trial court during the trial, and from the court's denial of his attorney fees under Code of Civil Procedure section 1021.5.

ANALYSIS

I. THE CITY'S APPEAL

A. Resolution 01-44 Is Subject to Challenge Under the Act

The gravamen of plaintiffs' complaint is that defendants failed to comply with the Act when it enacted Resolution 01-44. Defendants contend that plaintiffs' action is barred as a matter of law because a *reduction* in fees cannot be challenged under the Act. In a recent decision filed on December 22, 2005, the California Supreme held that a reenactment of a previous building permit and plan review fee – even if the fee remains the same (i.e., not increased) – constitutes a "'modif[ication] or amend[ment of] an existing fee or service charge" under section 66022, subdivision (a). (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 703 (*Barratt*).)

1. Standard of Review

"'[T]he trial court's construction of a statute is purely a question of law and is subject to de novo review on appeal.' [Citation.]" (*Reis v. Biggs Unified School Dist.* (2005) 126 Cal.App.4th 809, 816.)

2. Principles of Statutory Construction

The fundamental principle of statutory construction is to ascertain legislative intent and to interpret the statute so as to give effect to the Legislature's objective. (*Pollack v. Department of Motor Vehicles* (1985) 38 Cal.3d 367, 372.) "'To determine

the intent [of a statute or regulation], the court turns first to the words, attempting to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage. [Citations.] The words must be construed in context in light of the nature and obvious purpose of the regulation where they appear. [Citation.] The various parts of an enactment must be harmonized in context of the framework as a whole. [Citations.] The regulation [or statute] must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the agency, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity.' [Citation.]" (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 559-560.)

The first step is to analyze the words of the statute in context with related provisions and to give the words their plain and common sense meaning. (*People v. McHenry* (2000) 77 Cal.App.4th 730, 732-733.) The court can neither insert language that has been left out nor omit language that has been inserted. (*California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal.App.4th 1003, 1011.) "'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . . .' [Citation.]" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.)

"However, the literal meaning of a statute must be in accord with its purpose as the Supreme Court noted in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659 [25 Cal.Rptr.2d 109, 863 P.2d 179], as follows: 'We are not prohibited "from

determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [statute]. . . ." [Citation.]'" (*People v. McHenry*, *supra*, 77 Cal.App.4th at p. 733.)

Finally, "[w]hen a statutory provision is ambiguous and there is no clear case or other persuasive authority on the subject, 'contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.]" (*McGraw v. Department of Motor Vehicles* (1985) 165 Cal.App.3d 490, 493.)

3. Background on the Act

"The Mitigation Fee Act (Gov. Code, §§ 66000-66025) [fn. omitted] (the Act) was passed by the Legislature '"in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects."' (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 864.)" (*Barratt*, *supra*, 37 Cal.4th 691.)

The Act generally states that zoning and permit fees "may not exceed the estimated reasonable cost of providing the service for which the fee is charged, unless a

question regarding the amount of the fee charged in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue." (§ 66014.)

"Section 66016, subdivision (a) . . . provides the remedy for over-collections: 'Unless there has been voter approval, as prescribed by Section 66013 or 66014, no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service charge is levied. If, however, the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess.'" (*Barratt, supra*, 37 Cal.4th at p. 694.)

"Both sections 66014 and 66016 require that '[a]ny judicial action or proceeding to attack, review, set aside, void, or annul the ordinance, resolution, or motion' authorizing the charge of a fee subject to those sections 'shall be brought pursuant to Section 66022.' (§§ 66014, subd. (c), 66016, subd. (e).)" (*Barratt, supra*, 37 Cal.4th at p. 694.)

Section 66022 states that any judicial action or proceeding "to attack, review, set aside, void, or annul an ordinance, resolution, or motion adopting a new fee or service charge, or *modifying or amending* an existing fee or service charge, adopted by a local agency, . . . shall be commenced within 120 days of the effective date of the ordinance, resolution, or motion." (§ 66022, subd. (a), italics added.)

4. A Reduction in Fees Can Be Challenged Under Section 66022

Here, there is no dispute that under Resolution 01-44, the City reduced building permit and inspection fees. The City therefore argues that "[t]he text of Sections 66014 and 66016 precludes any argument that the Mitigation Fee Act applies to the reduction or recodification of a fee or service charge." This argument has been rejected by the Supreme Court in *Barratt, supra*, 37 Cal.4th 685.

In *Barratt*, the defendant – the City of Rancho Cucamonga (Rancho Cucamonga) – adopted a resolution in July 1999 setting forth a comprehensive fee schedule for various services that Rancho Cucamonga provided. (*Barratt, supra*, 37 Cal.4th at p. 692.) In December 2000, Rancho Cucamonga adopted a second resolution "which modified certain fees set in 1999." (*Ibid*.) The second resolution "slightly increased, by 50 cents[.]" (*Ibid*.) "The resolution explained that the new fee was a correction of a previous typographical error." (*Ibid.*) In January 2002, Rancho Cucamonga adopted a third resolution, which modified certain fees set in 2000. However, the building permit fee was reduced by 50 cents – this resolution "apparently reintroduced the typographical error that the 2000 ordinance had corrected." (*Ibid*.) Barratt sued Rancho Cucamonga on various grounds. (*Id*. at pp. 692-693.) Pertinent to this appeal, Barratt sought the invalidation of the third resolution under sections 66016 and 66022. (*Barratt, supra*, 37 Cal.4th at p. 693.) Rancho Cucamonga demurred to the complaint. The trial court sustained the demurrer without leave to amend. Among other findings, the trial court found that Barratt could not attack the third resolution because it "was not a new or

increased fee under section 66016." (*Id*. at p. 693.) We agreed with the trial court and affirmed the judgment. (*Ibid*.) The Supreme Court, however, has disagreed.

In *Barratt*, the Supreme Court found that the third resolution, a "reenactment of the previous building permit and plan review fees constituted a 'modif[ication] or amend[ment of] an existing fee or service charge.' (§ 66022, subd. (a).) Although the *amount* of the permit and plan review fees remained the same, [the third resolution] changed the *duration* of the fee by extending its applicability, and by implication its validity." (*Barratt*, *supra*, 37 Cal.4th at p. 703.) The Supreme Court went on to state that without this interpretation of the Act, "if a fee was not challenged at its initial enactment, then the validity of all subsequent reenactments would be immune to judicial challenge or review. Thus, there would be no effective enforcement mechanism to ensure that local agencies are complying with their duty to reduce the fees if revenues exceed actual costs." (*Ibid.*) Therefore, the Supreme Court concluded that "Barratt could seek to invalidate the building permit and plan review fees in [the third resolution.]" (*Id.* at p. 704.)

Based on this recent Supreme Court case, under the doctrine of stare decisis, we are bound to find that Jenkins could seek to invalidate Resolution 01-44 under the Act. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

B. The Trial Court Abused Its Discretion in Invalidating the Resolution

The City contends that the judgment should be reversed because the "trial court erred by abandoning the abuse of discretion standard when it ignored substantial evidence demonstrating the rationality of the City's fees fee-setting methodology."

1. Background

The gravamen of the complaint is that the City, under resolution 01-44, "set fees of the Building Department which exceeded the estimated reasonable cost of providing the service and failed to comply with the last sentence of §66016(a) and determine actual revenue costs and return the 'profit' to the public."

In general, the City regularly adjusts and recalculates its building safety and plan check fees. Every two years since 1994, the City has retained RCS to perform a "cost of service fee study" and generate a "cost allocation plan" to ensure that the City sets fees at levels corresponding to the estimated cost of providing future services. Mr. Eric Johnson, a partner of RCS, testified on behalf of RCS.

A cost of service fee study identifies all the services that the City's building department provides, and establishes the cost for those services. A cost allocation plan is a method of establishing overhead rates between the building department and other city departments that provide services to each other. RCS provided both of these services to the City in 2001.

In preparing the cost of service fee study, RCS has to qualify 100 percent of the City's building department costs and to identify all building department employees through detailed interviews with staff in that department.

At this stage, the "whole emphasis" of RCS is to identify the cost of city services "because that information doesn't naturally exist in city documents." RCS calculates revenue and costs by identifying and cataloguing the services at issue, rather than tracking departments. RCS creates a master list of public agency services through an "iterative" process of interviewing staff members – often three or four times – regarding the steps involved in providing each service.

When RCS creates a fee study for a current client, such as the City, most of this baseline information already exists; thus, RCS focuses its interview process on procedural changes implemented since its last study, until, "at the very end of the process [it has] allocated out 100 percent of the time of 100 percent of the employees."

After RCS finishes the iterative cataloguing of services, RCS commences to calculate the appropriate fees. First, RCS creates a "revenue estimate" by averaging building department revenue collected over 10 years; this average includes revenue recorded for each of the nine previous years, and revenue budgeted to the current (i.e., tenth) year.

RCS averages these figures because the City's building permit and plan check fee revenue *fluctuate* with the regular business cycle. Accordingly, corresponding demand for new construction requiring inspections and plan checks varies over time. This

revenue picture "provides more stability to the organization and provides a picture of those revenues over time" when a public entity is setting fees. In essence, the City avoids overcorrecting its fees by "chasing" the business cycle by relying on a 10-year revenue average, rather than single-year revenue figure.

Thus, the study allows "a fairly accurate, if not very accurate, estimate of costs versus revenues, at the time the fee study is prepared," because "with the nine years actual on the revenue side and one-year estimate, [the City is confident that] it takes into consideration any overages from prior years."

Next, RCS creates a "cost estimate" consisting of a "time detail" and a "cost detail." RCS generates the time detail based on time allocation matrices obtained from the City's building director; these matrices state the annual number of hours devoted by each building department employee to each service for which the building department will charge. The cost detail is subdivided into numerous components, using data provided by the City's finance department: salary, fringe benefits, operating expenses, capital improvements, debt servicing, general overhead, equipment, and infrastructure. RCS uses these cost components to calculate a fully-allocated hourly rate for every position within the building department. Integrating the time detail with the cost detail yields the cost of providing the service in question. Thus, the cost estimate provides the City with a "snap-shot" of the building department's expenses at one point in time.

In March 2001, RCS performed a cost of service fee study for the City's building department. The study documented the revenues generated, and costs incurred, by all the

City's fee-related services, and made fee recommendations based on RCS's analysis of that data.

RCS calculated proposed fee reductions for each building department service using a ratio of budgeted cost divided by average revenue. The cost-over-revenue ratio yielded a percentage figure. RCS multiplied the percentage figure by the amount of the current fee to achieve the required reduction, which eliminated the entire temporary surplus for that fee. The specifics are noted below:

The fiscal year 2000-2001 budgeted cost, (i.e, the "cost estimate") for building plan check fees was $565,167. The 10-year average revenue for building plan check fees from 1990 and 2000 (i.e., the "revenue estimate") was $808,646. Average revenue was 154 percent of budgeted costs (i.e., an over-collection of $243,479). Therefore, this called for a corresponding fee reduction to meet the requirement under section 66016, subdivision (a), of the Act.

The cost-over-revenue ratio for building plan check fees was 0.699 (i.e., $565,167 / $808,646 = 0.699). Accordingly, the RCS study recommended that the current fee be set at 69.9 percent of the present level, as reflected by comparing the items labeled "Current Fee Structure" and "Suggested Fee For Cost Recovery Of 100%" in the Revenue and Cost Summary Worksheet (the worksheet). The worksheet explained the reduction:

(1) The Current Fee Structure describes Non-Repetitive Building and Plan Check Fees as "46% of Table 1-A of 1994 Uniform Building Code." The Suggested Fee

recommends setting Non-Repetitive Building and Plan Check Fees at "33% of Table 1-A of 1994 Uniform Building Code," which is approximately 69.9 percent of the "Current Fee Structure" amount.

(2) The Current Fee Structure described Repetitive Building and Plan Check Fees as "38% of Table 1-A of 1994 Uniform Building Code." The Suggested Fee recommends setting Repetitive Building and Plan Check Fees at "27% of Table 1-A of 1994 Uniform Building Code," which is also approximately 69.9 percent of the "Current Fee Structure" amount.

On May 16, 2001, the City adopted Resolution 01-44 by applying the above-mentioned calculations to all of the fees analyzed by the RCS study. Because the RCS study reflected that the City had temporarily overcollected for building department permit and plan check fees, the resolution *lowered* such fees.

During trial, plaintiff's expert, Richard McCarthy, argued that the City must adopt a different method for calculating the cost of providing fee-related services. "McCarthy testified at length concerning the generic average inspection time for single family homes. . . . [¶] McCarthy testified he calculated the time necessary to perform the inspection function for three typical new homes . . . McCarthy applie[d] his generic time/motion study to the City's fully burdened man-hour cost to reach his opinion of the reasonable cost of inspection. McCarthy then compare[d] his hours and the City's fully burdened man-hour cost to the fee charged by the City, to determine that the City makes a profit. [Citation.]"

The trial court found that the City's method for generating source data for the RCS study was reasonable. The court stated: "I'm going to find the way you determine the hours [required for building inspection department to perform their various tasks] is not unreasonable. In other words, your matrix and your going out and interviewing the people and having people who have done the work say this is what it takes, I'm not going to find that unreasonable . . . ." The court, however, found that the City's method for tracking historical fee revenue violated the Act: "I do not see how taking nine years[']worth of actual revenue, estimating the tenth year's worth of revenue, and making that your fee, without considering what your costs are, meet the requirements of the statute, which is that your costs -- your fee may not exceed your cost[s]. To me, that is just an average number of your revenues over that ten-year period, and if in the year that you are making your study you happened to make a profit, you put that profit into your average number. Maybe I'm wrong. You dilute it by a factor of ten, so you're not actually, as was testified to, reducing the next year's fees by the excess revenue."

In its Statement of Intended Decision, the trial court stated as follows:

"The thrust of McCarthy's testimony is that he has determined, based on his experience, the time it takes to perform a specific task. McCarthy argues that his generic time/motion study multiplied by the City's fully burdened man-hour cost equates to the reasonable cost of providing the services required by the statute. McCarthy wants to impose his methodology on the City. McCarthy's crusade may serve a useful purpose in

focusing attention on the basis for determining the fee. However, *the City has the legislative discretion to proceed as the majority of the City Council decides*.

". . . . . .

"The City has not shown that the method used to determine the amount of the fee bares [*sic*] any reasonable relation to the cost of services. The City develops time estimates for the performance of services by interviews with the employees who perform the tasks. After developing the time element of the fee charge, the City then compares on the revenue side, nine years of actual revenue plus one year of projected revenue for the current budget year with the expected budgeted costs, salaries and benefits for the current budget year on the expenditure side. The comparison of the nine year actual plus one year budgeted revenue with one year budgeted costs does not meet the statutory requirement of determining if fees exceed the estimated cost to perform the service.

"A ten year average is just that, a ten year average of revenue. By definition the ninth year revenue which is evidence of actual revenue averaged with the budgeted revenue and the other eight years of actual revenue will reduce the ninth year actual revenue and correspondingly any excess revenue over costs.

"This imprecise method of determining the fee does not comply with Government Code §§ 66014 or 66016." (Italics added.)

2. Standard of Review

Code of Civil Procedure section 1085 permits judicial review of ministerial and legislative acts. "Mandate will lie to compel performance of a clear, present and usually

ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty. [Citation.] [¶] Mandate will also lie to correct the exercise of discretionary legislative power, but only if the action taken is fraudulent or so palpably unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law. [Citations.] This test is highly deferential, as it should be when the court is called upon to interfere with the exercise of legislative discretion by an elected governmental body. [Citation.] Legislative enactments are presumed to be valid; to overcome this presumption the petitioner must bring forth evidence compelling the conclusion that the ordinance is unreasonable and invalid. [Citation.]" (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 972-973.)

In a mandate proceeding, the trial court's findings as to foundational facts are conclusive if supported by substantial evidence. This court performs essentially the same function as the trial court, "determining if the local entity's action was arbitrary or palpably unreasonable." (*County of Del Norte v. City of Crescent City*, *supra*, 71 Cal.App.4th at p. 973.)

3. The City's Decrease in Fees Was Neither Arbitrary Nor Unreasonable

The Act required that the City's fees "not exceed the estimated reasonable cost of providing the service for which the fee is charged . . . ." (§ 66014, subd. (a).) "If, however, the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess." (§ 66016,

subd. (a).) The Act does not set forth how the City should calculate the "estimated reasonable cost" or reduce its fees, if the City's fees generate a surplus.

Here, the City demonstrated that its actions were neither arbitrary nor capricious when determining that its fees should be reduced. The City's consultant, RCS, averaged nine years of historical actual revenue and a tenth year of current estimated revenue; RCS did so because building department fee receipts fluctuate based on the business cycle. Receipts depend on the volume of permitting activity generated by developers, who calibrate their building activity to the changes in the housing market. RCS was "[t]rying to take a multi-year look at these revenues, because in essence building revenues follow the building cycle. So [RCS was] trying to follow that cycle over, again, the longest period of time that was still relevant to get a more accurate picture." The early part of the nine-year period included a recession, whereas the middle and later years included periods of economic growth.

With respect to the tenth-year revenue data, the City compiles its budget six months before the end of the current fiscal year, and tries to project revenue 18 months into the future. The uncertainty inherent in making such revenue projections, and the degree to which the actual revenue fluctuated from year to year, illustrates why RCS chose to calculate historic revenue based on an average including the nine previous years. Revenue projections are akin to projecting what the stock market is going to be tomorrow, or even a week later, because of the fluctuations in demand for housing, and, accordingly, for permitting activity in the construction industry.

Therefore, given the circumstances under which cities must calculate building safety and plan check fees, one year's data "wasn't really providing an accurate picture of the organization over a period of time." "[I]nstead of capturing extremes at both ends [of the cycle,]" the revenue averaging techniques tries to "capture a middle ground to try and get some stability to the system, so that the fees just aren't chasing the business cycle." If the City relied on a one-year revenue history, then in a year when the building department conducted an unusually large amount of inspections, the revenue figure would be correspondingly high. Conversely, in a year when the building department conducted an unusually small amount of inspections, the revenue figure would be correspondingly low. Therefore, the multi-year revenue achieves "an accurate representation" of the City's past and present revenue recovery. Should the City recover more revenue than expected, RCS incorporates that spike in receipts into the 10-year revenue average in the next fee study.

The RCS fee study captured a revenue-versus-cost picture of a time period when the building department's costs were fixed and the level of building activity and inspections increased dramatically. Thus, the fee reduction recommended by RCS and implemented by the City eliminated, for each building and inspection fee analyzed by RCS, the surplus reflected in the study.

Notwithstanding the above, the trial court found that the City had abused its discretion because the City failed to show "that the method used to determine the amount of the fee bares [*sic*] any reasonable relation to the cost of services." In essence, the trial

court disagreed with the *amount* of the fee reduction because the City calculated it by comparing an average revenue for 10 years with the present year's budgeted costs, rather than comparing the previous year's actual revenue surplus to the present year's budgeted costs. The court found that the 10-year averaging method was imprecise. It stated: "A ten year average is just that, a ten year average of revenue. By definition the ninth year revenue which is evidence of actual revenue averaged with the budgeted revenue and the other eight years of actual revenue will reduce the ninth year actual revenue and correspondingly any excess revenue over costs." The court then concluded that "[t]his imprecise method of determining the fee does not comply with Government Code §§ 66014 or 66016."

In making its finding, however, the trial court went beyond its limited scope of review. As an appellate court in *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264 (*City of Dublin*) stated, specificity in calculating costs with certainty is not required. (*Id*. at p. 283.) "Instead, the record need only demonstrate a reasonable relationship between the fees to be charged and the *estimated* cost of the service or program to be provided; that requirement may be satisfied by evidence showing only that the fees will generate substantially less than the anticipated costs. [Citations.]" (*Ibid*.) Moreover, in *California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935 (*Professional Scientists*), the court of appeal found a regulatory fee was not a special tax subject to super-majority voter approval requirements because it was reasonably related – albeit not on a dollar-for-dollar basis – to the cost of

services. (*Id*. at pp. 941-942.) The court noted that "a regulatory fee, to survive as a fee, does not require a precise cost-fee ratio." (*Id*. p. 950.) Demanding such a precise calculation was impractical, given the complexity of the regulatory program at issue, whose fees were "not easily correlated to a specific, ascertainable cost." (*Ibid*.)

Here, as provided above, the Act requires only that fees "may not exceed the *estimated* reasonable cost of providing the service for which the fee is charged," absent voter approval. (§ 66014, italics added.) The trial court's implicit finding that the Act requires a *yearly*, dollar-for-dollar correspondence between the City's fee revenue and costs, is not supported by the Act. As the courts above have found, we, too, find that the Act does not require a precise calculation. Instead, the study performed by RCS and adopted by the City in assessing its fee reduction, as specified above, is supported by substantial evidence.

On appeal, Jenkins argues that the trial court correctly ruled that the 10-year averaging method failed to comply with the Act because "the City of Corona never determined actual cost of providing the service for any year prior to the preparation of Exhibit BB and never made a comparison between actual revenue and cost to determine if it had a 'profit.'" We do not agree with Jenkins's assessment of the evidence. On the contrary, we find that there was substantial evidence to support the City's decision to decrease its building fees.

Here, Exhibit BB showed the actual expenditures and revenues for the fiscal year 2001-2002 for the City's building department. As to the prior years, the evidence

showed that RCS performed a cost of service fee study and generated a cost allocation plan – to ensure that the City sets fees at levels corresponding to the estimated cost of providing future services. In order to calculate the appropriate fees, RCS created a "revenue estimate" by averaging building department revenue collected over 10 years – this average included revenue recorded for each of the nine years prior to 2001-2003, and revenue budgeted for the tenth year. RCS averaged these figures because of fluctuations in the housing market. RCS also created a detailed cost estimate for the City, as outlined in detail above. Thereafter, RCS prepared a cost of service fee study for the City's building department. The study documented the revenues generated, and costs incurred, by all the City's fee-related services, and made fee recommendations based on RCS's analysis of that data. Based on this evidence – we find Jenkins's argument to be unavailing. Nothing in the Act mandates *how* a city should perform its duties. Here, the City properly exercised its discretion in deciding how to proceed with the mandates of the Act. We, as the judicial branch of government, are bound by the City's decisions so long as they are not capricious or arbitrary. As noted above, we find the City's actions to be neither.

Moreover, in support of his argument, Jenkins relies heavily on exhibits that were *not* admitted into evidence. For example, Jenkins stated: (1) "[w]hile the Court did not admit Exhibits 2-7, 2-8 and 2-9, . . . those exhibits clearly show the inaccuracies of the budgeting process of the City of Corona." (2) "[t]he Plaintiff had other exhibits for prior years showing that actual revenue for the Building Department far exceeded budgeted

revenue for every year commencing with the fiscal year 1993/1994. However, these were not presented to the Lower Court . . . ." Because this evidence was not a part of the record below, we cannot consider it on appeal.

Based on the thoughtful and deliberative process that the City employed before adopting its fee reduction, we find that there is sufficient evidence to support the City's fee reduction, and discern no abuse of discretion by the City.

Two appellate court cases – *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320 (*Garrick*), and *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294 (*Mike Moore's Towing*) – support our holding.

a. *Garrick Development Co. v. Hayward Unified School District*

In *Garrick*, plaintiff developers of residential property appealed from an order denying them a petition for writ of mandate "by which they sought the return of school facilities fees they had paid under protest . . . as conditions to obtaining building permits. [Fn. omitted.]" (*Garrick, supra,* 3 Cal.App.4th at p. 323.) The developers argued that the Hayward Unified School District (the district) and its governing board of education (the board) "imposed the fees in violation of statutory requirements and constitutional limitations." (*Ibid*.) The appellate court affirmed the trial court's denial of the petition. (*Ibid*.)

The appellate court rejected the plaintiffs' contention that the district should have provided "specific plans" for new facilities, rather than a list of projects, their costs and approximate completion dates. (*Garrick, supra*, 3 Cal.App.4th at p. 331.) In *Garrick,*

the district relied on a report prepared by Urbanplan; the report identified increased enrollment and attendant new school construction costs attributable solely to new development, "[e]vidence of this sort meets case law requirements [citation] without the need to show specific construction plans." (*Id*. at p. 332.)

The court also rejected the plaintiffs' criticisms of the Urbanplan report. The plaintiffs asserted that the report's 20-year projections could not be accurate. The court noted that although accurate projections are more difficult over long time periods, "this does not make the use of 20 years 'arbitrary' in a legal sense." (*Garrick, supra*, 3 Cal.App.4th at p. 333.) Such long term forecasts are neither "inherently unreliable" nor "so arbitrary as to be mere speculation." (*Ibid*.)

The plaintiffs also asserted that the report should have focused on mobile buildings, and not on more costly permanent buildings. (*Garrick, supra*, 3 Cal.App.4th at p. 333.) Again, the court disagreed; it found that the choice between permanent and movable facilities "is a legislative one whose wisdom we cannot second guess." (*Ibid*.) Therefore, the court found that the record provided a reasonable basis for upholding the fee as reasonably related to the cost of school facilities. (*Id*. at p. 334.)

This case is similar. Just as *Garrick, supra*, 3 Cal.App.4th 320, used a 20-year projection in its study, RCS generated a 10-year revenue average in its plan for the City. As the court in *Garrick* stated, even though it is more difficult to have accurate projections over long periods, this does not make the use of a 10-year revenue average to be "'arbitrary' in a legal sense." (*Id.* at p. 333.) Notwithstanding the trial court's dismay

at the "ten year average" as being an "imprecise method of determining the fee," we agree with the court in *Garrick* that a long-term forecast, using an average, is neither "inherently unreliable" nor "so arbitrary as to be mere speculation." (*Ibid*.) Therefore, because the decrease in fees adopted by the City was supported by substantial evidence, the trial court abused its discretion in finding that the method used by the City to determine the amount of fees violated the Act.

b. *Mike Moore's Towing*

In *Mike Moore's Towing*, the City of San Diego awarded five-year contracts for vehicle towing in nine districts. (*Mike Moore's Towing*, *supra*, 45 Cal.App.4th at p. 1299.) Moore, a losing bidder for some of the contracts, petitioned for a writ of mandate to reverse the city's rejection of its protests that (1) the winning bidder, San Diego Police Tow Operators, Inc. (SDPTO), should have been disqualified for omissions in its bid; and (2) Moore's own bid should not have been disqualified as incomplete. (*Ibid*.) "The trial court rejected Moore's claim that its bid should have been found complete, but accepted the argument of the Moore group that a fair hearing had not been held before the City Council because the evidence presented at the hearing included a misrepresentation by City staff that there were no material omissions in the SDPTO bid. The trial court remanded the matter to the City Council to reconsider the bids submitted in the three districts, with directions to consider a particular document presented at the protest hearing supporting the Moore group's allegations of material omissions by SDPTO." (*Ibid*.)

On appeal, the appellate court concluded that "both the award of the contracts and the decision to reject the protest should be considered legislative actions. [Fn. omitted.]" (*Mike Moore's Towing, supra,* 45 Cal.App.4th at p. 1303.) Therefore, the review of the city's legislative determination "is through ordinary mandamus under section 1085. 'Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support. [Citation.]' . . . . However the test is formulated, '. . . the ultimate questions, whether the agency's decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy or unlawful or procedurally unfair, are essentially questions of law. With respect to these questions the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal. [Citations.]' [Citation.]" (*Mike Moore's Towing, supra*, 45 Cal.App.4th at p. 1303.)

Keeping this standard of review in mind, the appellate court deferred to the city's judgment that SDPTO's responses to specific inquiries during the bidding process were sufficient according to the guidelines imposed by the city's Request for Proposals (RFP). The court stated that the city could waive SDPTO's failure to provide a specific verbatim response to the agreed cost and conflict of interest provisions. SDPTO's provision of insurance information regarding its members, rather than its corporate entity, was immaterial because corporate insurance information was not required at the bidding stage. The city reasonably concluded that the credit rating information SDPTO provided was adequate for purposes of accepting the bid. SDPTO's general description of its

operational methodology for towing services was sufficient in lieu of a narrative detail of its technical approach to each aspect of towing. (*Mike Moore's Towing*, *supra*, 45 Cal.App.4th at pp. 1307-1311.) Therefore, the court stated, "[o]n the entire record, we conclude that the City could reasonably have found that the RFP requirements were satisfied by the SDPTO bid, and there were no material omissions interfering with the City's ability to understand and approve that bid." (*Id*. at p. 1311.)

Similarly, the appellate court concluded that the city properly rejected Moore's bid for inadvertently omitting biographical data that the city considered indispensable. (*Mike Moore's Towing*, *supra*, 45 Cal.App.4th at pp. 1311-1312.) The court emphasized that it is "a legislative function to consider data, opinion, and arguments, and then to exercise discretion guided by considerations of the public welfare." (*Id*. at p. 1312.) The court concluded by stating, "[o]n this record, the City's decision was not 'substantively irrational, arbitrary, capricious or wholly lacking in evidentiary support.' [Citation.]" (*Id*. at p. 1313.)

This case is similar. Here, as noted above, the City considered data, opinion and arguments regarding the 10-year average of revenue analyzed by RCS. The City then exercised its discretion in considering the RCS report and adopting the fee decrease. On the record summarized above, "the City's decision was not 'substantively irrational, arbitrary, capricious or wholly lacking in evidentiary support.' [Citation.]" (*Mike Moore's Towing*, *supra*, 45 Cal.App.4th at p. 1313.) Therefore, the trial court

overstepped its role in finding that the City should have used a different method to determine the fees in question.

In sum, we find that the City demonstrated that its actions were neither arbitrary nor capricious when determining that its fees should be reduced. Therefore, we hold that the trial court abused its discretion in finding to the contrary.[2]

II. JENKINS'S CROSS-APPEAL

A. The Trial Court Properly Granted Defendants' Motions in Limine

In his cross-appeal, Jenkins contends that "the lower court improperly granted defendants' motions in limine numbers one and two preventing testimony by plaintiff's experts and preventing plaintiff from presenting supporting evidence"; and "the lower court improperly granted defendants' motion in limine number three preventing evidence of the profit made by the City of Corona prior to the fiscal year 2001/2002."

1. Standard of Review

The trial court is vested with broad discretion in ruling on the admissibility of evidence. Its ruling will be upset only if there is a clear showing of an abuse of discretion. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422,

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[2] Because we reverse the trial court's granting of plaintiffs' preemptory writ of mandate "[t]o cease and desist using the current methodology presently employed by the [City of Corona] to determine the fees and charges by the [City of Corona] to the public for the services of its building department as the methodology used violates the law[,]" we need not address the City's other arguments that (1) "[t]he court erred by admitting testimony regarding the time and cost required to perform building department services because such estimates rested solely on inadmissible data from other jurisdictions"; and

[footnote continued on next page]

1431.) The abuse of discretion standard implies "'"absence of arbitrary determination, capricious disposition or whimsical thinking."' [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.)

2. The Trial Court Did Not Abuse Its Discretion in Granting Defendant's Motion in Limine Nos. One and Two

In the defendants' first motion in limine, defendants claimed that plaintiff proposed "to present evidence at trial on the way the County of Riverside, the City of Murietta [*sic*] and possibly other public entities set and charge their respective building permit fees." Defendants argued that this type of evidence was inadmissible and should be excluded.

First, defendants argued that evidence of other cities' and counties' building department procedures or fee calculations are irrelevant to determine whether the City's own practices violate the Act, because the Act does not require that (1) public entities employ identical or similar building inspection procedures; (2) fees assessed by public entities be similar; or (3) one public entity's policies and procedures set a precedent for another public entity's policies and procedures.

Second, defendants argued that if the trial court admitted evidence from the County of Riverside and City of Murrieta, the City would have offered rebuttal testimony

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[footnote continued from previous page]
(2) "[t]he trial court erred by requiring the City to exercise its legislative discretion to achieve a specific result in violation of the separation of powers doctrine."

showing that approximately 90 percent of California's cities use the same method for calculating building permit fees as Corona. Therefore, admitting this type of evidence would cause undue delay, cumulative presentation, and confusion of issues.

In the second motion in limine, defendants argued that the trial court should exclude testimony from plaintiff's designated experts – Tom Ingram (an employee of the County of Riverside) and Dennis Blundell (an employee of the City of Murrieta) – on the evidence discussed above. Defendants argued that the proffered testimony of Ingram and Blundell regarding the procedures and fees of their respective jurisdiction was irrelevant for the reasons set forth above.

Moreover, plaintiff failed to file a declaration under Code of Civil Procedure section 2034, subdivision (f)(2), indicating that Ingram and Blundell would submit to a "'meaningful oral deposition'" regarding their testimony. Ingram and Blundell both admitted that they had no expert opinion on the issues in this case.

On the hearings of the first motion in limine, the court and the attorneys for plaintiff and defendants discussed in great detail the issue of admissibility of the proffered evidence. When the City's counsel indicated that the City "set a fee for whatever the item is that comes across the desk that has to be reviewed by an employee[,]" the court then inquired, "what is the relevance of whatever the County of Riverside or City of Murrieta does?" The court emphasized that evidence of what the City was charging for an inspection and what the cost was for the inspection was relevant – not whether "the City of Riverside does it faster." The court went on to elaborate:

"Why do I have to compare the time? If it takes the City of Corona three hours to do it, and it takes the County of Riverside two hours to do it, why does that mean that Corona is charging more than their cost?" After further discussions between the court and plaintiff's counsel, the court asked, "Why is the Court in a position to in essence run the City of Corona's business? [¶] I'm here to determine whether or not they charged a fee of $10, and it only cost them $5 to do it, and therefore they have to adjust the fee so that the fee equals their costs, and if they want to spend more time to do it or if they want to have more people do it, that's their business." After this colloquy, the court granted the motion in limine "subject to [plaintiff] making a prima facie case, and then maybe [the court may] have some way to determine what the evidence should be."

The court thereafter stated, "The same thing goes with [motion in limine] number two, because that's your expert who testifies about it takes him two hours and it - - one and two are granted. You can renew your argument after you've finished with your prima facie case."

When these issues arose again during the proceedings, the court made the following comments: "It's not the Court's function to decide that somebody's time estimate is better than somebody else's. It is the function of the Court to look at what the evidence was and decide whether or not what they did was reasonable."

Based on the careful consideration of the motions in limine by the court, we cannot discern an abuse of discretion by the trial court in ruling on the motions. As provided above, the abuse of discretion standard implies "'"absence of arbitrary

determination, capricious disposition or whimsical thinking."' [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Mullens, supra,* 119 Cal.App.4th at p. 658.) Here, the trial court was thoroughly aware of the issue at hand, allowed plaintiff's counsel to argue his position, and gave a thoughtful disposition on the issue. We cannot say that the trial court's decision was arbitrary, capricious or of whimsical thinking.

3. The Trial Court Did Not Abuse Its Discretion in Granting Defendant's Motion in Limine No. Three

In the third motion in limine, defendants argued that the trial court should exclude evidence "regarding the fees collected by the City prior to the adoption of Resolution 2001-44" because "[a]ny claim that the fees the City collected prior to the adoption of Resolution 2001-44 is barred by the statute of limitations in Government Code section 66022."

The Act requires that "[a]ny judicial action or proceeding to attack, review, set aside, void, or annul the ordinance, resolution, or motion authorizing the charge of a fee subject to this section shall be brought pursuant to section 66022." (§ 66014, subd. (c).) Any proceeding challenging a resolution "adopting a new fee or service charge, or modifying or amending an existing fee or service charge . . . shall be commenced within 120 days of the effective date of the ordinance, resolution, or motion. . . ." (§ 66022, subd. (a).)

The limitations period "runs from the effective date of the ordinance, resolution, or motion imposing fees, not from the date the fee is actually charged to the customer." (*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1190 (*Indian Wells*).) Thus, "the enactment of a utility rate or rate increase, and not a subsequent act which actually imposes a utility charge, triggers the 120-day statute of limitations." (*Regents of the University of California v. City and County of San Francisco* (2004) 115 Cal.App.4th 1109, 1115 (*Regents*).) "The purpose of such a short statute of limitations is to enhance the budgetary stability of public utilities, by promptly informing them of any challenges to their ability to charge and collect capital facilities fees." (*Id.* at p. 1111; see also *Indian Wells, supra*, 26 Cal.4th at pp. 1189-1190.)

In *California Psychiatric Transitions, Inc. v. Delhi County Water Dist*. (2003) 111 Cal.App.4th 1156 (*California Psychiatric Transitions*), plaintiff challenged the defendant District's water connection charges under the Act. (*Id*. at p. 1160.) Plaintiff contended that its challenge was timely because it attacked the imposition of fees on a particular development project, not the fee ordinance itself, which was adopted and amended years before plaintiff filed suit. (*Id*. at pp. 1160, 1163.) This contention was unavailing because "section 66022 clearly requires an action seeking review of the ordinance to be filed within 120 days of the adoption of the 'new fee or service charge, or modifi[cation] or amend[ment] [of] an existing fee or service charge' -- that is, adoption of an ordinance, resolution, or motion establishing the charge that is to be applied by the local agency."

(*Id*. at pp. 1162-1163 [brackets in original].) Thus, the court held that plaintiff's action was time-barred. (*Id*. at p. 1163.)

In *Utility Cost Management v. East Bay Mun. Utility District* (2000) 79 Cal.App.4th 1242, section 66022 barred the plaintiff from seeking a refund of capital improvement fees paid to the East Bay Municipal Utility District. (*Id*. at p. 1245.) The district had revised its water rates numerous times since 1986, with the most recent revision becoming effective in July 1997. (*Id*. at p. 1246.) The plaintiff sought a refund for fees that were paid years before the most recent revisions to the district's water rates, and thus "asked for a refund . . . of the excess payments . . . since 1986." (*Id*. at p. 1246.) The district argued that the plaintiff's complaint was barred by the 120-day statute of limitations under section 66022. (*Utility Cost Management v. East Bay Mun. Utility District, supra*, 79 Cal.App.4th at p. 1246.) The trial court agreed, and granted summary judgment on behalf of the district. (*Ibid*.) The appellate court affirmed. (*Id*. at p. 1252-1253.)

In *Trend Homes, Inc. v. Central Unified School Dist.* (1990) 220 Cal.App.3d 102, a developer's challenge to school impact fees designed to relieve overcrowding was barred by the statute of limitations under section 54955 (the predecessor to section 66022). (*Trend Homes, Inc. v. Central Unified School Dist., supra*, 220 Cal.App.3d at p. 110.) The limitations period commenced to run upon the enactment of the original resolution that determined the existence of school overcrowding, not upon the execution of agreement several months later, which imposed fees on developers. (*Id*. at p. 110.)

The agreements "would not have been entered into but for the resolutions of overcrowding," and thus, "although the resolutions did not levy the fees directly, the resolutions were the source of the agreement which did. It is the validity of these resolutions that the complaint attacks." (*Id*. at p. 110.)

During the hearing on the motion, the court noted: "You can only challenge that -- my understanding of 66022, and if I'm correct, that it applies to a decrease in fee, you may only charge -- you may only address the year that the fee has been in effect." Thereafter, counsel for both sides and the trial court engaged in a lengthy discussion on this issue. In fact, during this discussion, the trial court repeatedly asked counsel for the City to explain why such evidence would be barred. At the end, the trial court stated: "I think in view of the 120-day statute, the only time the – the only revenue and cost figures that we may look at to determine if they are making a profit are those since the enactment of 2001-44."

Notwithstanding, plaintiff argues that he should have been able to challenge revenue accrued under fee resolutions that predate the 120-day limitations period merely by challenging Resolution 01-44. Plaintiff argues that evidence of such receipts was relevant to prove that, at the time the City enacted Resolution 01-44, it "had a 'profit' which it was required to return to the public" under section 66016, subdivision (a). In so doing, plaintiff attacks the *revenue* generated by past fee resolutions by arguing that, when the City enacted Resolution 01-44, it was duty bound to review all of its accumulated collections. The Act, however, requires that plaintiff challenge the

resolution at issue within 120 days of its enactment. "Any user had the right to complain at the time and then take action" against the alleged excessive fees; otherwise, his claims are forever barred. (*Regents*, *supra*, 115 Cal.App.4th at p. 1116.)

Based on the careful consideration of the motion in limine by the court, we cannot discern an abuse of discretion by the trial court in ruling on the motion. As provided above, the abuse of discretion standard implies "'"absence of arbitrary determination, capricious disposition or whimsical thinking."' [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Mullens*, *supra*, 119 Cal.App.4th at p. 658.) Here, from the discussion that occurred between the court and counsel, it was clear that the trial court understood the complexity of the statute of limitations argument. Only after a thorough discussion of this issue, the trial court rendered its decision. Based on the Act and the court's thoughtful consideration of this issue, we cannot say that its decision was arbitrary, capricious or of whimsical thinking. There was no abuse of discretion.

B. The Trial Court Properly Denied Plaintiff's Motion to Strike Testimony

Plaintiff contends that the trial court erred in denying his motion to exclude the testimony of the City's fee study expert, Eric Johnson, on the ground that Johnson was a mere percipient witness to his own quantitative analysis and therefore could not opine to either (1) the validity of the source data for the city's fee study, or (2) the propriety of its fee-setting decisions. We disagree.

1. Standard of Review

The admission of expert opinion testimony is within the sound discretion of the trial court. (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1227.) We may not interfere with that discretion unless it is clearly abused. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

2. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion to Strike Johnson's Testimony

To testify as an expert, a witness must possess adequate knowledge, training, and experience. (Evid. Code, § 720, subd. (a).) The party offering the expert must demonstrate the expert's knowledge of the subject is sufficient; the determinative issue in each case is whether the expert has enough skill or experience in the field that his testimony will likely assist the trier of fact. (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219.)

In this case, the City designated Johnson as an expert witness in his profession – i.e., performing fee cost studies for public entities. The City elicited testimony from Johnson about the nature of his services. Plaintiff moved to prevent Johnson from testifying on the ground that he lacked the knowledge on how to perform a building inspection and did not independently verify the source data that the City provided for the fee study.

During trial, the City explained that, although Johnson had been designated as an expert in fee studies, he testified as a percipient witness to the extent his testimony

"describe[d] the process that the City engaged in" to ascertain whether its fee structure complied with the law, as part of the biannual fee review it conducted before passing Resolution 01-44. Thus, Johnson was "not . . . proffered as [an] expert in the building department or any of the City's departments." For these reasons, the City did not withdraw its expert designation for Johnson, and still offered him as an expert in the field of "fee cost studies."

Therefore, Johnson never offered an opinion regarding whether, as a matter of law, the building safety and plan check fees established under Resolution 01-44 equaled the estimated reasonable cost of providing services. Moreover, he did not testify regarding the source or validity of the City's cost matrices, which he incorporated into his fee study. Instead, Johnson testified about *how* he performed the fee study for the City in March 2001 as to its contents and conclusions. Thereafter, plaintiff stipulated that, even though Johnson prepared the fee study, Johnson did not decide when and how the City should adjust fees. Rather, the city council makes these types of determinations.

In sum, the nature and scope of Johnson's testimony was limited. Johnson never proffered his opinion on the reliability of the City's source data for the fee study or the legal soundness of the City's fee-setting decisions. Instead, Johnson testified as to how he performed the fee cost study on behalf of the City as an expert witness. Although plaintiff complains about Johnson's testimony as "garbage in, garbage out," he has failed to demonstrate how the trial court abused its discretion in denying his motion to exclude Johnson's testimony.

Therefore, we find that there was no abuse of discretion in the trial court's decision to deny plaintiff's motion to exclude Johnson's testimony as unqualified expert opinion.

C. Plaintiff's "Burden of Proof" Argument Fails

Plaintiff argues that the City bore the burden of proof at trial and failed to meet it. In his reply brief, plaintiff states, "[t]hen, the question before this Court is – 'Did the Defendants satisfy that burden [of proof] and introduce a sufficient amount of evidence which showed that the fees equaled the estimated reasonable cost of providing a service?'" As discussed in detail above in this opinion, *supra*, Analysis, Section B, the City demonstrated that its actions in reducing the fees were neither arbitrary nor capricious because it was supported by substantial evidence. Therefore, we need not revisit this issue on plaintiff's cross-appeal.

D. The Attorney Fees Issue Is Moot

Plaintiff contends that the trial court erred in denying his motion for attorney fees. The trial court may award attorney fees to a successful party under the "private attorney general" theory under certain circumstances. (Code Civ. Proc., § 1021.5.) Because we reverse the judgment, plaintiff is no longer a "successful party." Therefore, the issue regarding the award of attorney fees is now moot.

DISPOSITION

Judgment is reversed. The trial court is directed to vacate its judgment in favor of plaintiff and enter a new judgment in favor of defendants. Plaintiff is ordered to pay all costs on appeal.

HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

KING
J.

Filed 6/9/06

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

GEORGE JENKINS,	
Plaintiff and Appellant,	E036270
v.	(Super.Ct.No. RIC359371)
CITY OF CORONA et al.,	The County of Riverside
Defendants and Appellants.	

THE COURT

A request having been made to this court, pursuant to rule 978 of the California Rules of Court, for publication of a nonpublished opinion heretofore filed in the above-entitled matter on May 10, 2006, and it appearing that the opinion meets the standard for publication as specified in rule 976 of the California Rules of Court:

IT IS ORDERED that said opinion be certified for publication pursuant to California Rules of Court, rule 976.

HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

KING
J.